

A Low Cheng Soon v TA Securities Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL OF APPEAL NO W-02-230 OF 1998

ABDUL HAMID MOHAMAD, KC VOHRAH AND ALAUDDIN JJCA
11 NOVEMBER 2002

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Civil Procedure — Appeal — Appeal to Court of Appeal — Non-compliance with mandatory rule relating to appeal — Whether preliminary objection based on such non-compliance ought to be allowed by court

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Civil Procedure — Appeal — Record of appeal — Failure to include ‘all documents put in evidence’ in record of appeal — Failure to include all exhibits in record of appeal — Materiality and relevance of exhibits, counsel or court to decide — Whether r 18(4)(c) of the Rules of the Court of Appeal 1994 mandatory in nature — Whether court would allow preliminary objection based on failure to comply with r 18(4) — Rules of the Court of Appeal 1994 rr 18(4)(c), (6) and 102

D

Civil Procedure — Rules of court — Non-compliance — Effect of such non-compliance

E

In the High Court, the respondent’s claim was allowed with costs whereas the appellant’s counterclaim was dismissed with costs. The appellant thus appealed to the Court of Appeal. Before the start of the appeal, counsel for the respondent raised a preliminary objection based on the failure of the appellant to comply with r 18(4) of the Rules of the Court of Appeal 1994 (‘the Rules’). Counsel for the respondent submitted that there were 80 exhibits produced at the hearing before the High Court whereas only six exhibits were included in the record of appeal. Counsel for the respondent had given notice of his objection to the appellant but had not received any reply. Counsel for the appellant countered that the appellant was only concerned with two exhibits and these exhibits were included in the record of appeal.

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Held, allowing the preliminary objection and dismissing the appeal with costs:

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(1) The word ‘shall’ used in r 18(4)(c) of the Rules reflects a measure of mandatoriness in it. This is a mandatory rule and must be strictly adhered to. Since the rule speaks of ‘all documents put in evidence’, this meant that the appellant had to include all the exhibits produced before the High Court. As the case was concerned with transactions of shares which often involve technicalities, the Court of Appeal would be placed in a difficult situation to determine the appeal without the aid of the exhibits. It was not for appellant’s counsel to decide or say that only two exhibits were material. It was for the court to decide which exhibits were material and relevant to the appeal (see p 394D–G).

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- (2) The importance of the Rules of Court cannot be ignored as otherwise the courts would be faced with endless problems involving the administration of justice (see p 394G–H); *Yu Oi Yang & Anor v Ho Toong Peng & Ors* [1977] 1 MLJ 120 and *Chua Choong Yin v Tan Boon Bak Trading Sdn Bhd & Anor* [2002] 4 MLJ 145 followed. In the instant appeal, the court would uphold the preliminary objection not because of mere non-compliance with the rule but because the non-compliance resulted in a huge chunk of exhibits being left out of the record of appeal. Despite being informed by respondent's counsel of his objection, the appellant showed no response — an attitude which amounted to a blatant disregard for the Rules. The appellant also made no attempt to apply for leave to file a supplementary appeal record, which application if made, would have been approved by the Court of Appeal. The appeal was thus not properly brought before the Court of Appeal (see p 395G–H).

[Bahasa Malaysia summary]

Di Mahkamah Tinggi, tuntutan responden telah dibenarkan dengan kos manakala tuntutan balas perayu telah ditolak dengan kos. Perayu oleh demikian telah membuat rayuan ke Mahkamah Rayuan. Sebelum bermulanya rayuan tersebut, peguam bagi pihak responden telah menimbulkan satu bantahan awal berdasarkan kegagalan perayu untuk mematuhi k 18(4) Kaedah-Kaedah Mahkamah Rayuan 1994 ('Kaedah-Kaedah tersebut'). Peguam bagi pihak responden berhujah bahawa terdapat 80 ekshibit-ekshibit yang telah dikemukakan di perbicaraan di hadapan Mahkamah Tinggi manakala hanya enam ekshibit sahaja yang telah disertakan ke dalam rekod rayuan. Peguam bagi pihak responden telah memberikan notis tentang bantahan beliau kepada perayu tetapi masih belum mendapat apa-apa jawapan. Peguam bagi pihak perayu membalas bahawa perayu hanya mementingkan dua ekshibit sahaja dan ekshibit-ekshibit tersebut telah disertakan ke dalam rekod rayuan.

Diputuskan, membenarkan bantahan awal tersebut dan menolak rayuan tersebut dengan kos:

- (1) Perkataan 'shall' yang digunakan dalam k 18(4)(c) Kaedah-Kaedah tersebut menunjukkan terdapat satu ukuran yang mandatori. Ini adalah satu kaedah mandatori dan mesti dipatuhi. Memandangkan kaedah tersebut menyatakan 'all documents put in evidence', ini bermakna bahawa perayu hendaklah menyertakan kesemua ekshibit-ekshibit yang telah dikemukakan di hadapan Mahkamah Tinggi. Memandangkan kes tersebut adalah berkaitan dengan transaksi-transaksi saham-saham yang melibatkan unsur teknikal, Mahkamah Rayuan akan berada dalam keadaan yang sukar untuk menentukan rayuan tersebut

- A** tanpa bantuan ekshibit-ekshibit tersebut. Ia bukanlah bagi peguam perayu untuk memutuskan atau menyatakan bahawa hanya dua ekshibit adalah material. Ia adalah bagi mahkamah untuk memutuskan ekshibit-ekshibit yang mana adalah material dan relevan dalam rayuan tersebut (lihat ms 394D–G).
- B** (2) Kepentingan Kaedah-Kaedah tersebut tidak boleh diambil ringan kerana jika tidak mahkamah-mahkamah akan berdepan dengan pelbagai masalah yang melibatkan pentadbiran keadilan (lihat ms 394G); *Yu Oi Yang & Anor v Ho Toong Peng & Ors* [1977] 1 MLJ 120 dan *Chua Choong Yin v Tan Boon Bak Trading Sdn Bhd & Anor* [2002] 4 MLJ 145 diikuti. Dalam rayuan semasa, mahkamah akan mengekalkan bantahan awal bukan kerana ketidakpatuhan dengan kaedah, tetapi kerana ketidakpatuhan tersebut mengakibatkan sebahagian besar ekshibit-ekshibit tidak disertakan ke dalam rekod rayuan. Meskipun telah dimaklumkan oleh peguam responden tentang bantahan beliau, perayu tidak menunjukkan apa-apa respons — satu sikap yang tidak mempedulikan Kaedah-Kaedah tersebut secara terang-terangan. Perayu juga tidak membuat apa-apa untuk memohon kebenaran memfailkan satu rekod rayuan tambahan, di mana sekiranya permohonan tersebut telah dibuat, pasti akan dibenarkan oleh Mahkamah Rayuan. Rayuan tersebut oleh demikian tidak dikemukakan dengan betul di hadapan Mahkamah Rayuan (lihat ms 395G–H).]
- C**
- D**
- E**

Notes

For cases on appeal to Court of Appeal, 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 598.

F For cases on record of appeal, 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1126–1168.

For cases on non-compliance of rules of court, 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5198–5199.

G Cases referred to

Chua Choong Yin v Tan Boon Bak Trading Sdn Bhd & Anor [2002] 4 MLJ 145 (folld)

Yu Oi Yong & Anor v Ho Toong Peng & Ors [1977] 1 MLJ 120 (folld)

H Legislation referred to

Rules of the Court of Appeal 1994 rr 18(4)(c), (6), 102

Appeal from: Writ of Summons No D4–22–109 of 1991 (High Court, Kuala Lumpur)

I *Joseph Clemons (Burhanudin Abdul Wahid and Alice Lee Sok Wah with him) (Lee Sok Wah & Co)* for the appellant.
YL Chong (YL Chong) for the respondent.

Alauddin JCA (delivering judgment of the court): This is an appeal against the decision of the High Court Kuala Lumpur, which had allowed the respondent's claim and dismissed the appellant's counterclaim with costs.

The respondent is a stockbroking firm and has been in this business since 1973. Previously the respondent was known as Othman & Ng Securities Sdn Bhd.

The appellant is a client of the respondent. The appellant opened a trading account with the respondent sometime in 1990. The appellant's application to open the said trading account with the respondent was approved and given account no 16648.

On 6 March 1990, the appellant signed a margin agreement with the respondent which has the effect of converting the appellant's retail account no 16648 into a margin account bearing the same number.

The appellant traded in his account from 12 February 1990 to 6 March 1990 under his trading account no 16648 and thereafter under his margin account. A licensed dealer's representative ('PW6') was assigned to handle the appellant's account and she was assisted by PW5, an administrative assistant.

On 27 August 1990, the appellant signed another margin agreement with the respondent. This account is a nominee account identified as 'Othman & Ng Nominees Account 100' and can be utilized by the appellant when he signed an indemnity ('exh P11') in respect of the said account. It is also a margin trading account.

Apart from the second margin agreement, the appellant also signed an admission letter dated 27 August 1990 in which the appellant admitted that he owed the respondent a sum of RM1,466,282.09 and agreed to settle the said outstanding debts incurred under his margin trading account no 16648 by utilizing any sale proceeds from his collateral shares and contra gains from his new margin account under 'Othman & Ng Nominees A/C 100'.

The respondent issued cheques to the appellant in respect of shares sold and contra gains under his nominee account and the proceeds thereof were utilized to set off the outstanding amount under the appellant's margin trading account no 16648.

From the share transactions conducted by the respondent on the instructions of the appellant including force-selling of the appellant's collateral shares pledged with the respondent, the net amount outstanding due to the respondent from the appellant is RM541,995.86.

The respondent therefore claims for a sum of RM541,995.86 and interest at the rate of 12%pa over RM466,049.98 from 1 January 1991 until full settlement and costs against the appellant for outstanding contra losses, roll-over fees and interests thereon arising from share transactions due upon the instructions of the appellant.

The appellant, on the other hand counterclaims for the following:

- (i) a declaration that the share transactions in his account is 'illegal and void';

- A** (ii) refund of all shares deposited by him with the respondent under the margin trading agreement or its value at the date of deposit and the sum of RM370,000 together with interest thereon at the rate of 8%pa from the date of deposit to the date of realization;
- (iii) loss and damage suffered by the appellant; and
- B** (iv) costs.

At the conclusion of the hearing the learned judge allowed the respondent's claim with costs. As for the appellant's counterclaim he found there were no merits and dismissed them with costs. Hence, the present appeal before us.

- C** Before the start of the appeal before us learned counsel for the respondent raised a preliminary objection based on the failure of the appellant to comply with r 18(4)(c) of the Rules of the Court of Appeal 1994 ('the Rules').

- D** Learned counsel for the respondent submitted that there were altogether 80 exhibits produced at the hearing before the High Court. However, only six were included in the appeal record. Learned counsel referred us to p 49 of bundle A of the appeal record. The learned judge had there referred to certain exhibits, ie D21-D25 (share deposit forms), P27(1)-P27(38) (contract notes) and P28 (a)-(m) (payment vouchers) and drew a finding that PW6 was the dealer's representative who had
- E** conducted all the share transactions as stated in the said documents for the appellant.

Turning on to p 51 of the same bundle, the learned judge made reference to exh 37 (endorsements on the appellant's passport) and made the following finding:

- F** I hold that exh 37 is inadmissible for being hearsay evidence. That being the case the defendant had failed to prove that he was in Hongkong from 18 February 1990 to 21 February 1990. The defendant cannot claim that he was not around during those dates to conduct the share transactions.

Again at p 54 of bundle A, the learned judge referred to exhs P10 and P11 and had this to say:

- G** The defendant's evidence in court had clearly contradicted exhs P10 and P11 which he himself had admitted signing.

- H** Learned counsel for the respondent candidly admitted that when he received the draft index of the documents from the appellant, he was unaware that these exhibits were not included. However, upon realizing this fact, he immediately gave notice of his objection to the appellant. Unfortunately, there was no reply from the appellant.

- I** Before us, in response to learned counsel for the respondent, learned counsel for the appellant took a simplistic approach to the objection by informing us that in this appeal they were concerned with only two exhibits; ie P1 (application to operate a trading account with the respondent) and P2 (the margin agreement) and these exhibits were included in the record of appeal. Learned counsel then referred us to r 102 of the Rules which

deals with the effect of non-compliance ie not to render any proceedings void. **A**

We have carefully perused the record of appeal and we found at bundle C, only six exhibits were attached whereas p 268 of bundle B revealed that there were altogether 85 exhibits produced before the High Court.

It must be observed that the language used in r 18(4)(c) of the Rules is as follows: **B**

(4) The appellant *shall* attach to such memorandum copies of the proceedings in the High Court, including —

(a) ...

(b) ...

(c) copies of *all affidavits* read and of *all* documents put in evidence in the High Court so far as they are material for the purposes of the appeal ... **C**

(Emphasis added.)

There is no doubt in our minds and we agree with learned counsel for the respondent that this rule is mandatory. There are abundant authorities decided in our courts to suggest that the word 'shall' when used in any legislation means 'obligatory'. However, we do not propose to cite these authorities. Suffice it for us to say that the word 'shall' used in r 18(4)(c) of the Rules reflects a measure of mandatoriness in it. As this is a mandatory rule, it must therefore be strictly adhered to. **D**

The said rule also speaks of 'all documents put in evidence'. This must mean that in the context of this appeal the appellant must include all the exhibits produced before the High Court. It cannot be overemphasized that these exhibits are essential in the determination of the appeal. As the case is concerned with transactions of shares in the stock market which often involve technicalities we feel that we will be placed in a difficult situation to decide the matter without the aid of all the exhibits. **E**

Next, the said rule says 'so far as they are material for the purposes of the appeal'. Now, who is to decide which exhibits are material for the purpose of this appeal? We must say with the greatest of respect to learned counsel for the appellant that it is not a matter for him to decide or say that only two exhibits are material. It is for the court to decide which exhibits are material and relevant to this appeal. **F**

In our judgment, the importance of the Rules cannot be ignored as otherwise the courts will be faced with endless problems involving the administration of justice. Speaking of the importance of the Rules, the learned judge, Chang Min Tat J (as he then was) in *Yu Oi Yong & Anor v Ho Toong Peng & Ors* [1977] 1 MLJ 120 had this to say (at p 121): **G**

There should, in my view, be some adherence to the rules of court, unless required by circumstances, if there is to be any meaning or purpose in such rules. **H**

It should, I think, be realized by practitioners as well as by judges that while strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for **I**

- A** no reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice.

In *Chua Choong Yin v Tan Boon Bak Trading Sdn Bhd & Anor* [2002] 4 MLJ 145, the Court of Appeal was faced with similar issues. There the respondent raised two preliminary issues namely non-compliance by the appellant with:

- B**
- (i) Practice Direction No 3 of 1992; and
 - (ii) Rules 18(4)(c) and (6) of the Rules of the Court of Appeal 1994 ('the Rules').

- C** Speaking through Siti Norma Yaacob JCA (as she then was), this is what the court said with respect to the first issue (at p 150):

- Whilst we appreciate that practice directions do not have the force of law, they are created for a specific purpose, namely to regulate a systematic and consistent procedure governing the filing of appeal records. For that reason they have to be adhered to otherwise chaos and uncertainty in the filing of appeal records shall prevail. See the cases of *Yeo Yoo Teik v Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 MLJ 54 and *Ling Siok Seng v Ting Sieh Chung* [1998] 4 MLJ 65.
- D**

- In dealing with the second issue, the court found that the appellant was in clear breach of r 18(4)(c) of the Rules when he included in his record of appeals two prohibited (under court order) exhibits. The solicitors for the first respondent, by letter, pointed out to the appellant that the inclusion of the said exhibits in his index of documents was in defiance of the court order but despite being put on notice, the appellant insisted on including the offending two exhibits and the fact of the first respondent's objection does not appear in the appeal records as required under r 18(6) of the Rules.
- E**

- F** The court found that the appellant's refusal to acknowledge the objection was a clear breach of r 18(6) of the Rules for which no explanation was forthcoming from him.

- The court upheld both preliminary objections and dismissed the appeal with costs.
- G**

- Coming back to the instant appeal before us and for the reasons we have already mentioned earlier, we would uphold the preliminary objection. We do so not because there is mere non-compliance with the Rules but rather because of the consequence which resulted from such non-compliance ie a huge chunk of exhibits have been left out of the record of appeal. Despite being informed by learned counsel for the respondent of his objection, the appellant showed no response, an attitude which in our opinion amounted to a blatant disregard for the Rules. There was also no attempt made by the appellant to apply for leave to file a supplementary appeal record. Such application, if made would have easily met our approval. Unfortunately, nothing was done. We would therefore conclude that this appeal is not properly brought before us and on that finding we dismiss it with costs and order that the deposit be paid to the respondent to account of its taxed costs.
- H**
- I**

My learned brother, Abdul Hamid Mohamad JCA has seen the judgment and agreed with it. **A**

My learned brother, KC Vohrah JCA has since retired.

Preliminary objection allowed and appeal dismissed with costs.

Reported by Andrew Christopher Simon **B**

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